NOT DESIGNATED FOR PUBLICATION
DIVISION IV

ARKANSAS COURT OF APPEALS

No. CA06-380

	Opinion Delivered JANUARY 17, 2007
PENNY FRESHOUR APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. EDR2004-4448]
V.	HON. ALICE S. GRAY, JUDGE
BRIAN ABNEY APPELLEE	AFFIRMED

SAM BIRD, Judge

Appellant Dr. Penny Freshour and appellee Brian Abney are the parents of a daughter and a son, each born out of wedlock. Abney filed a petition in the Pulaski County Circuit Court on September 13, 2004, admitting paternity and stating that Freshour was the proper person to have custody of the children subject to his specific visitation. The trial court entered its final order in this case on December 14, 2005. Freshour appeals the decision, raising three points. She contends that the trial court erred by allowing Abney unsupervised visitation, by improperly setting his amount of child support, and by not ordering him to pay all lying-in expenses related to the birth of their minor son. Finding no error, we affirm.

Visitation

Freshour contends that the trial court erred by granting Abney unsupervised visitation when no material change in circumstances had been shown and unsupervised visitation was not in the best interest of the children. Abney responds that no material change of

circumstances was required for the final decision concerning visitation because the previous visitation orders were only temporary. He contends that the trial court's decision regarding visitation was within its sound discretion and the best interests of the children. Both parties emphasize evidence before the trial court regarding alcohol use by each party and Abney's ability to properly care for the children.

In reviewing domestic-relations cases, we consider the evidence *de novo*, but we will not reverse a trial judge's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). The main consideration in making judicial determinations concerning visitation is the best interest of the child. *Id.* Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Id.* The fixing of visitation rights is a matter that lies within the sound discretion of the trial court. *Id.* We give due deference to the superior position of the trial judge to view and judge the credibility of the witnesses. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

At a hearing on November 23, 2004, when the children were six months and two-and-a-half years old, Abney requested "normal visitation" and Freshour requested supervised visitation. The trial court noted that the hearing had been set for only twenty minutes and that normally it took longer than twenty minutes to fully try visitation cases. Noting that the

parties thought that the hearing was temporary, the court inquired if they could agree on some visitation "pending returning." Freshour's attorney replied:

> Currently, Your Honor, we've had an informal agreement that he has supervised visitation. We should be fine to continue that until we can have a full hearing on it on the visitation issue. The visitation issue to my client is that most important issue in the case. . . . We would like to be fully heard on that issue.

The parties voiced differing views on visitation, and the court reminded them that the issue could not be fully tried in twenty minutes. The court then ordered the following:

> Every Wednesday from 4:30 p.m. until 8:00 p.m. and Sundays from 12:30 p.m. to 7:00, and that's until we come back and have a hearing and I hear what both of you have to say, and the visitation is to be supervised.
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> At this point that's all I can do. I don't have to order anything today because we're not having a hearing today, but since the issue has been raised, I have to err on the side of caution for the children's sake and set it supervised. That doesn't mean the Court is going to set supervised after the end of the hearing. I'll just have to hear what the evidence is in the case and decide from there. . . .

The bench ruling was reduced to writing in temporary orders of December 28 and 29, 2004, which stated that Abney's visitation with the children would continue to be supervised because the court "is always very careful concerning the wellbeing of children." The written order stated that the schedule would continue until further orders of the court and that all visitation would be supervised by a person agreed upon by the parties.

At a hearing on July 25, 2005, evidence was presented about past incidents of excessive use of alcohol by both parties and about a traffic stop on the evening of April 13, 2005 when Abney was pulled over after returning the children from a visit and registered .04 on a breathalyzer test. Citing a "need to know that [Abney] doesn't have a problem now," the court ordered both parties to attend "transparenting" classes and undergo assessment to

determine whether they needed treatment for alcohol abuse. Ruling that Abney would be allowed "some unsupervised visitation, but not overnight, prior to us coming back," the court set three hours on Wednesdays and day-long visitation every two Saturdays out of three. Abney was forbidden to consume alcohol for two days before having the children. The court said it had no problem if Freshour wanted to hire a private investigator to follow Abney, and it granted her request that she provide transportation both to and from his visits.

On August 4, 2005, before the court's bench ruling of July 25, 2005 was reduced to written order, Freshour filed an ex parte emergency motion for suspension of unsupervised visitation. She alleged that Abney had violated the court's orders and placed the children in extreme danger by driving a boat while drinking alcohol in the presence of the children on July 30, 2005; attached to her motion was the affidavit of a witness to the alleged incident. The court entered an ex parte emergency order on August 8, 2005, modifying temporary visitation as follows:

> From 9am–1pm every other Saturday and 2 pm–6 pm every other Sunday, said visitation to occur in the presence of up to two people designated by [Freshour], who may also be one of the two people present.

A hearing was conducted on August 17, 2005, on Freshour's emergency petition to suspend visitation. A witness for Freshour testified that Abney had the children in a boat and consumed alcohol, but Abney and his witnesses stated that there was no alcohol in the boat and that their canned beverages were soft drinks. The court set aside its ex parte order and ordered the parties to follow the previous temporary order for visitation. The court stated in its written order of August 17, 2005 that "enough concern has been raised regarding [Abney's]

history of alcohol use to require him to exercise restricted temporary visitation." Abney was allowed visitation for three hours on Wednesdays and for six hours on two consecutive Saturdays out of three, without overnight visitation; he was prohibited from driving any motorized mode of transportation with the children present; and he was forbidden to consume alcohol for two days before having the children or twenty-four hours afterward.

At the final hearing on September 7, 2005, after undergoing assessments of alcohol use, each party again testified and presented evidence on the issue of visitation and Abney's parenting activities. In a conference call of October 3, 2005, the court announced its decision in the case. Stating that the visitation order then in effect would be left in place for six months, the court ruled that the visitation was "permanent" but would be set up as a graduated visitation schedule. The court's oral ruling was reflected in its final written order of December 14, 2005.

The final order stated that Abney's visitation with the children would continue as set out in the court's "previous order" but that standard visitation would begin on April 1, 2006. Visitation was set forth as every other weekend from Friday at 6:00 p.m. through Sunday at 6:00 p.m. and every Wednesday evening for two-and-a-half hours; holidays were divided or alternated; Abney was granted summer visitation of two weeks in 2006, with a week to be added each year until reaching five weeks; and spring breaks were to alternate between the parties when the oldest child turned six years old. The order provided that Freshour could require Abney to take a breathalyzer test if she had reasonable suspicion that he had consumed alcohol within eight hours before visitation, during visitation, or within two hours afterward;

she would reimburse him the cost of the test should it be negative. This provision was to end on October 3, 2007, but even after that date Abney was forbidden to drive with the children if he was intoxicated.

Freshour asserts on appeal that the trial court's final order for graduated visitation was an erroneous modification of its previous visitation schedule, and she asserts that the graduated visitation schedule was not in the best interest of the children. She complains that the final order did not specify what Abney needed to do to better himself and his situation, nor did it set out certain conditions that he was required to meet in order to alleviate the court's concerns about his history of drinking.

We agree with Abney that no material change of circumstances was required for the final decision concerning visitation because the previous visitation orders were only temporary. For example, the court's temporary visitation orders of December 28 and 29, 2004, resulted from the twenty-minute hearing of November 23, 2004, in which the court commented, "That doesn't mean the Court is going to set supervised after the end of the hearing. I'll just have to hear what the evidence is in the case." Additionally, at the conclusion of the July 25, 2005 hearing, the trial court mentioned its need to know whether Abney still had an alcohol problem, and it ordered assessments for alcohol abuse before the parties returned to court.

Freshour relies upon our prior decisions in such cases as *Stellpflug v. Stellpflug*, 70 Ark. App. 88, 14 S.W.3d 536 (2000), and *Leonard v. Stidham*, 59 Ark. App. 5, 952 S.W.2d 189 (1997), where we reversed a trial court's modification of visitation because there was no

showing of changed circumstances. However, the finality of previous orders was not an issue in those cases. Here, we hold that the previous orders were indeed temporary and, thus, no changed circumstances were required before the trial court entered its final visitation order.

Freshour also argues that the final order did not account for the trial court's concerns about Abney's past history of alcohol use. We note the comments of the trial court at a hearing of December 7, 2005, on entry of the final order. The court stated:

> What can happen . . . is if there have been some things happening and if you want to bring them to the Court's attention prior to April 1st, she's certainly welcome to do that.
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> We've had several hearings in this case, and I try to . . . . What I try to do in these cases where I have an allegation of drug abuse or alcohol abuse is set some basic visitation far enough off that if there's some problems prior to then, you all can come back to court before that April 1st visitation starts.

It is clear from these comments that the trial court did not ignore the possibility that the problem of alcohol abuse might again arise.

We reject Freshour's arguments that the trial court erred by granting Abney unsupervised visitation when no material change in circumstances had been shown and unsupervised visitation was not in the best interest of the children.

Child Support

Freshour contends that the trial court erred by improperly setting the amount of child support when it did not consider factors relevant to the determination of the support amount. She primarily argues that the trial court did not make a determination of Abney's income for purposes of establishing child support, blindly accepting his statement of income and not requiring proof of his annual income. She also complains that the court, despite stating at the

first hearing that retroactive amounts of child support could be addressed, did not order retroactive support from the date of the parties' separation.

At the temporary hearing of November 23, 2004, Abney testified that he worked strictly on a commission basis, having made $50,000 "the previous year" and $70,000 "last year," and grossing "in the 60s" at the time of the hearing. The court calculated his income as follows:

> I multiplied 60 time .75 because I've deducted .25 for taxes and came up with $45,000 as an annual net figure, and I don't know that that's right, but it's pretty close, that's a take home amount, and that $45,000 divided by 52–I have $865 per week as a weekly amount.
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> . . . .
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> $865 per week, and there's two children?

Freshour points to no objection she made after the first hearing to the amount of income to which Abney testified or to the amount calculated by the trial court. The court ordered child-support payments of $205 per week, which comports with the amount of support for two children and an income of $860 under Administrative Order No. 10– Child Support Guidelines. *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 347 Ark. Appx. 1064, 1084 (2002). The court also ordered Abney to reimburse Freshour for twenty percent of the cost of the children's medical insurance, and ordered each party to pay half of all "uncovered" medical bills. The court did not order reimbursement for transportation or supervisor expenses related to visitation, but Freshour had requested that she transport the children and she had paid supervisors for visitation without being ordered to do so. Finally, retroactive orders of child support are within the trial court's discretion. *Stepp v.*

Gray, 58 Ark. App. 229, 947 S.W.2d 798 (1997). We find no error in the trial court's order of child support.

Lying-In Expenses

Freshour contends that the trial court erred by not ordering Abney to pay all of her lying-in expenses related to the birth of the parties' minor son. She relies upon Ark. Code Ann. § 9-10-110 (a) (Repl. 2002) which states:

> (a) If it is found by the court that the accused is the father of the child, the court shall render judgment against him for the lying-in expenses in favor of the mother, person, or agency incurring the lying-in expenses, if claimed.

In *Taylor v. Finck*, 363 Ark. 183 ___, ___ S.W.3d ___ (2005), our supreme court wrote:

> The major purpose of Arkansas' filiation laws is to provide a process by which the putative father can be identified so that he may assume his equitable share of the responsibility for his child. *However, a trial court, in awarding lying-in expenses or attorney's fees, may exercise its discretion in determining the amount that the father should bear. Furthermore, the trial court may even consider the mother's financial means when making an award. Eaves* [*v. Dover*, 291 Ark. 545, 726 S.W.2d 276 (1987)].

(Emphasis added.)

We note there was evidence before the court that Freshour was a doctor who earned her own income. It was within the court's discretion to order that Abney pay only half of the lying-in expenses.

Affirmed.

HART and GRIFFEN, JJ., agree.